

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FINAL ORDER

**IN THE MATTER OF THE DESIGNATION OF THE POWDER RIVER BASIN CONTROLLED
GROUNDWATER AREA**

Pursuant to the Montana Water Use Act, Mont. Code Ann. _ 85-2-506, and after notice required by law, public hearings were held on September 22 and 23 in Lodge Grass, Colstrip, Miles City, and Broadus to consider the Montana Department of Natural Resources and Conservation's proposal to designate a controlled groundwater area for the Powder River Basin in anticipation of expected groundwater withdrawals associated with coal bed methane development in the area. Comments were accepted into the record at the hearings and written comments were accepted through October 8, 1999. Based on the information gathered by the Department, the input of other agencies, and the public comment received the Department has modified its proposed findings, conclusion, and order as will follow. The public comment is addressed in the Memorandum that appears at the end of this order.

FINDINGS OF FACT

1.

Coal bed methane extraction technology requires groundwater withdrawal to lower groundwater levels and reduce water pressures in the coal beds. Wells may be placed at regular intervals over large areas covering many square miles. The wells are pumped continuously with the specific intent of lowering water pressures in the coal bed. Lowering water pressures will lower water levels in the aquifer.

2. During coal bed methane development, water is removed only from coal aquifers. Other aquifers in an area in a coal bed methane development area may or may not be affected depending upon connections between aquifers.
3. Coal beds are important regional aquifers in water-scarce southeastern Montana. The coal aquifers are often the only practical source of fresh water for domestic, stock, and agricultural uses by the people in the area.
4. The complexities of geology and hydrogeology and the uncertainty about the extent and precise location of future coal bed methane development do not allow an accurate assessment of conflicts with existing and future beneficial water use. However, there is considerable data available showing significant effects on water levels in coal aquifers from extensive and continuous pumping of water from coal mines in the Decker area.
5. Since coal bed methane development is of limited duration, 20 to 30 years, in any particular field, and because the aquifer is not otherwise disturbed, water in the aquifer most likely will recover to its pre-development level. However, even if an aquifer were to recover rapidly after development, the long period of development could cause severe hardship to local water users. Moreover,

- interrelationships among aquifers along with future precipitation patterns could cause unpredictable results.
6. Assessment of localized effects of coal bed methane development on water availability would require compiling baseline data from existing wells, before methane gas development, along with data from test wells and coal bed methane production wells. Monitoring of water levels, water pressures and pumping rates during development would also be necessary to determine the effects.
 7. The Department of Natural Resources and Conservation usually considers a one-half mile radius from any particular water well as the zone of possible influence from the well. When the Department receives an application for a water well the owners of all existing wells within that radius are notified. Available information does not justify an assumption that wells for coal bed methane development should be considered any different. However, neither does the information justify any assumption that wells or springs over a half a mile from coal bed methane development will not be affected. Baseline information should be gathered for any well within the general location of coal bed methane development so that the effects can be monitored.
 8. Although withdrawing groundwater is integral to the coal bed methane extraction method, water is not a desired product of the operation, and must be disposed. Since the withdrawal of the water is not a use of the water per se, a water use permit from the DNRC is not required for withdrawing the water. Public authorities do not otherwise regulate the withdrawal of ground water in the area except as it relates to coal mining.
 9. Water withdrawn during coal bed methane withdrawal may be suitable for use by local residents, agriculture, and business. Wells drilled for coal bed methane development could in some cases be developed as water sources for local residents, agriculture, and business.
 10. Wells that are inadequately sealed present a hazard of contaminating water in one aquifer with contaminants from another aquifer or introducing methane into non-coal aquifers. The Board of Oil and Gas Conservation regulates well construction and enforces standards for sealing gas wells. These standards are in excess of the standards of sealing water wells enforced by the Montana Board of Water Well Contractors.
 11. Since water withdrawn from the aquifers is not otherwise consumed, the water must be discharged in some matter. Any applicable water discharge permits must be obtained, and water disposal requirements must be met, before groundwater may be discharged, re-injected, or disposed in the Controlled Groundwater Area. Water discharge permits may include the Montana Pollutant Discharge Elimination System (MPDES) permit from the Department of Environmental Quality (DEQ), for discharge to surface water, and the Underground Injection Control (UIC) permit from the Board of Oil and Gas Conservation, for discharge re-injected to groundwater.
 12. Extensive coal bed methane development has occurred from coal-bearing strata within the Powder River Basin geologic structure in Wyoming and some development has occurred in Montana near Decker. The Powder River Basin geologic structure and associated coal-bearing strata extends north into southeastern Montana. Consequently, coal bed methane development will likely extend further north into southeastern Montana in the near future.
 13. The proposed controlled groundwater area includes the Wasatch Formation and the Tongue River Member of the Fort Union Formation. The formations are the two principle coal-bearing strata in southeastern Montana. The area forms a generally contiguous block of these coal-bearing formations within the Montana part of the Powder River Basin (see Map 1). According to the Montana Bureau of Mines and Geology (MBMG), the area includes all known strippable sub-bituminous coal deposits greater than 30 inches thick in southeastern Montana. (MBMG SP28, Figure 10).
 14. Montanans have a right to a clean and healthful environment.

CONCLUSIONS OF LAW

1. Excessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the area proposed for controlled ground water designation. By "excessive", the Department means that water levels in targeted aquifers could be reduced near project areas for long periods of time in a water-scarce area.
2. The public health, safety, and welfare require that such extensive water withdrawals in a water-scarce area are monitored and the water withdrawals be controlled where existing beneficial uses of water are adversely affected. Without this designation of a controlled ground water area the extensive withdrawals of ground water anticipated may proceed uncontrolled.
3. With this designation of a controlled groundwater area the withdrawal of groundwater associated with coal bed methane production will be under the prior jurisdiction of the Montana Board of Oil and Gas. However, water rights matters and hydrogeologic issues are not within the ordinary technical expertise and area of concern to the Board. These are matters ordinarily dealt with by the Montana Department of Natural Resources and Conservation and the Montana Bureau of Mines and Geology. The Montana Department of Natural Resources may petition the Board for hearings in regard to the production, use, and disposal of water from coal bed methane development wells that could effect existing water rights in the area based upon information gathered concerning water withdrawals.
4. This controlled groundwater designation will not affect regulation of new water rights for conventional water uses. If local interests wish to acquire water rights to wells constructed during coal bed methane development, a beneficial use permit will be required. Standard exceptions to permit requirement will still apply. For example, a permit will not be required for appropriations of 35 gallons per minute or less and not exceeding 10 acre-feet per year on wells developed for beneficial use. Laws for ground water withdrawals that do not require a water use permit such as conventional oil and gas activities, mining, or agricultural drainage, will remain in effect as in other parts of the state.
5. Discharges of water during coal bed methane development, and well sealing to prevent leakage and contamination are sufficiently regulated by the DEQ and Board of Oil and Gas.
6. The designation of a controlled groundwater area does not infringe on the rights of Montana citizens to a clean and healthful environment.

ORDER

The following described area, as also delineated on Map 1 attached, is designated a Controlled Groundwater Area under Mont. Code Ann. _ 85-2-506: all sections in Township 06N, Ranges 45E and 46E; all sections in Township 05North, Ranges 40East - 47 East; all sections in Township 04 North, Ranges 38 East, 39 East, 41East - 46 East, and 48 East; all sections in Township 03 North, Ranges 37 East - 49 East; all sections in Township 02 North, Ranges 36 East - 50 East; all sections in Township 01North, Ranges 36 East - 50 East; all sections in Township 01 South, Ranges 37 East - 50 East; all sections in Township 02 South, Ranges 37 East - 51 East; all sections in Township 03 South, Ranges 37 East - 51 East; all sections in Township 04 South, Ranges 37 East - 51 East; all sections in Township 05 South, Ranges 36 East - 50 East; all sections in Township 06 South, Ranges 36 East - 51 East; all sections in Township 07 South, Ranges 37 East - 51 East; all sections in Township 08 South, Ranges 37 East - 51 East; and all sections in Township 09 South, Ranges 37 East - 51 East. The controlled groundwater area includes all formations above the Lebo member of the Fort Union Formation.

1. Applicability to coal bed methane wells only.

This controlled groundwater area designation shall apply only to wells designed and installed for the extraction of coal bed methane (CBM).

2. Standards for Permitting, Drilling, and Producing Coalbed Methane Wells

CBM development within the controlled groundwater area must follow the standards for drilling, completing, testing, and production of CBM wells as adopted by the Board of Oil and Gas Conservation. Standards include: field development proposals including initial test wells and development plans; maps of the targeted coal bed; an inventory and hydrologic assessment of existing wells, springs, and streamflow that could be impacted by the operation; and means to mitigate water resource impacts. The Board of Oil and Gas Conservation shall consider applications for each coal bed methane production field. Approval of specific field rules may include requirements and restrictions in addition to the general operating standards.

3. Water Source Mitigation Contract

Coal bed methane operators must offer water mitigation agreements to owners of water wells or natural springs within one-half mile of a CBM field proposed for approval by the Board or within the area that the operator reasonably believes may be impacted by a CBM production operation, whichever is greater. This area will be automatically extended one-half mile beyond any well adversely affected. The mitigation agreement must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the CBM project and shall be under such conditions as the parties mutually agree upon. Mitigation agreements are intended to address the reduction or loss of water resources and may exclude mechanical, electrical, or similar loss of productivity not resulting from a reduction in the amount of available water due to production from CBM wells. The areas covered by mitigation agreements will be considered in review of field development proposals. The TAC will make recommendations to the Board of Oil and Gas Conservation if it identifies a need to increase the required mitigation area.

4. Technical Advisory Committee

The DNRC will designate a Technical Advisory Committee (TAC) with specific expertise in coal aquifer hydrology and shallow groundwater systems. The committee will oversee the groundwater characteristics and monitoring, and the reporting requirements identified in items 5 and 6 below. The TAC will also review groundwater data and scientific evidence related to the Powder River Basin Controlled Groundwater Area and advise the agencies on administration of the area.

The committee will consist of qualified scientists with experience related to the hydrogeology of coal aquifers and CBM extraction operations. The appointments and selections shall be to ensure, to the extent possible, that the committee includes members with expertise in hydrogeology, water quality, and CBM extraction systems and operations.

The TAC will periodically review groundwater data gathered from CBM development. This TAC will prepare an annual report each year, of their findings regarding the impact to the groundwater resource from CBM activities and any mitigation recommendations they may develop. The TAC may submit reports more often if they find it appropriate. Additionally, the TAC will make recommendations to the Board of Oil and Gas Conservation regarding development of specific groundwater characterization, monitoring, and reporting requirements for field developments.

5. Groundwater Characterization, Monitoring, and Reporting

Hydrologic conditions in the targeted coal beds must be assessed prior to field development to establish baseline conditions. Specific requirements of the field rules will dictate that groundwater pressure is

monitored in appropriate locations using dedicated monitoring wells, and that groundwater monitoring and reporting is conducted in a manner consistent with the recommendations outlined in the attached memorandum (Attachment A). In addition to all forms required by the Board of Oil and Gas Conservation Completion, a Montana Well Log Report, DNRC Form 603, must be completed for both production and monitoring wells when the wells are drilled and sent to DNRC at the address on the form within 60 days of the well completion.

The specific requirements for each production field will be developed with consideration of recommendations from the TAC. The procedures will include dedicated groundwater monitoring wells outside of, and surrounding the production field. The operator will be required to seek landowner approval to install such wells at appropriate distances from the field. State or federal lands should be considered. If the operator demonstrates that no site is available at appropriate distance, a well at the extreme outer limit of the operator's lease area may suffice. Dedicated groundwater monitoring wells must be placed in the next aquifer above and below the targeted coal seam, if applicable, within the production field. Also, as a minimum requirement, at least one 24-hour aquifer test must be conducted using at least one observation well, and baseline groundwater pressures and water quality data must be obtained from the monitoring wells prior to production.

6. Data Collection and Notice Procedures

Data collected from testing and production of CBM wells and any groundwater monitoring wells and springs required by the Board of Oil and Gas Conservation will be available to the public and provided to the Montana Bureau of Mines and Geology. The Board of Oil and Gas Conservation will notify DNRC of applications relating to CBM field development proposals so that the Department may supply a mailing list of potentially affected water right holders within one-half mile of the proposed field area. The Board will publish notice in accordance with its existing procedures and will additionally require the developer to send individual notices to the water right holders listed by the DNRC.

NOTICES

1. Precautions in Coalbed Methane Areas

Water well developers and drillers must exercise caution when drilling water wells in or near coal bed methane projects as free methane gas may be encountered in one or more coal beds. Drillers should contact the Board of Oil and Gas Conservation Office at (406) 656-0040 for information about coal bed methane activities in their area of interest.

2. Beneficial Use of Water

Beneficial uses of water produced from CBM operations, such as for stock ponds, wildlife ponds, or irrigation requires a water right issued by DNRC as provided by law.

3. Water Discharge and Re-injection

The DEQ Water Protection Bureau at (406) 444-3080 administers the Montana Pollution Discharge Elimination System permit. The Board of Oil and Gas Conservation at (406) 656-0040 administers the Underground Injection Control permit.

Dated this _____ day of December 1999.

Arthur Clinch, Director
Dept of Natural Resources and Conservation
1625 Eleventh Avenue
Helena, Montana 59620
(406) 444-2074

MEMORANDUM

The public hearings on the establishment of the Powder River Basin Controlled Groundwater Area were well attended and the Water Resources Division received substantial written comment. The public comment was unanimous in its concern that scarce water resources and existing water uses in the area be protected and overwhelmingly favored establishing a controlled groundwater area. The only dissent to the DNRC proposal did not object so much to the underlying goal of protecting the groundwater resource, but was more concerned that existing regulation was being duplicated.

Local public support for a controlled groundwater area is critical. The Powder River Basin situation is unique in its vast area, its water scarcity, the volume of withdrawals contemplated, and the immediacy of those withdrawals. The DNRC therefore initiated the process for establishing the area on its own motion rather than waiting for a local petition. If, however, it had appeared during the information-gathering period that the public was not interested in or did not favor establishing the area, the DNRC would not have gone forward with the proposal. After all, it is local water users that a controlled groundwater area is designed to protect.

The comment generally expressed concerns about a lack of information about the possible impacts of, and lack of government control and coordination over, water withdrawals and discharges during coal bed methane development. The DNRC has attempted to address these concerns with the modified findings, conclusion, and order.

The most important component of the modified order is the requirement to record and gather baseline and monitoring data so that problems and impacts can be detected as they occur. Of equal importance may be the establishment of a technical advisory committee to review, analyze, and make recommendations concerning the information gathered. The technical advisory committee can also review information provided by local water users. Judging from the public comment, the local land owners will be more than willing to provide any information they might have that will help the committee to track the impacts of the water withdrawals. Without such information and review, attempts to mitigate any adverse impact and to implement any necessary control over the development would be difficult. Individual water users generally do not have the resources to put together the information required to implement controls or mitigate impacts.

The modified order has also attempted to address concerns about the lack of coordination and duplication of regulation between government agencies. For example, the modified order recognizes the jurisdiction of the Montana Department of Environmental Quality over water discharges. The public comments expressed grave concern about the quality of the water and the DEQ has been apprized of that concern. The DNRC, however, will not be regulating in that area. It has also been determined that the Montana Board of Oil and Gas already has sealing standards for wells that will protect aquifers from contamination so that there is no reason to apply such standards as a condition of the controlled groundwater area.

One notable addition to the findings and conclusions concerns a Montana citizen's right to a clean and healthful environment guaranteed by Article II, Section 3 of the Montana Constitution. A recent Montana Supreme Court Decision, *Montana Environmental Information Center et al. v. Department of Environmental Quality*, 1999 MT 248, holds that the right to a clean and healthful environment is fundamental. Since water is vital, it would seem then that the Department would be remiss not to consider the environmental implications of establishing this controlled groundwater area. The Department believes that establishing the area will not intrude on the right to a clean and healthful environment, but rather will help to establish a means by which that right can be protected.

In conclusion, the DNRC was gratified by the interest and support expressed for the controlled groundwater area. When the community center in Broadus is filled to capacity and a petition with over 150 signatures from that sparsely populated area is submitted it cannot be ignored. The DNRC will reciprocate by keeping the public informed of all developments. The DNRC also appreciates the attendance by Redstone Gas Partners at each of the public meetings and the cooperation they have shown throughout this process. The DNRC has considered the comments of all the participants and those comments have entered into the fashioning of this final order.

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties on the attached lists this _____ day of December 1999.

**TONGUE RIVER WATER USERS' ASSOCIATION'S
WRITTEN TESTIMONY IN
OPPOSITION TO HB 575**

February 17, 2009

Dear Members of the House Agriculture Committee:

It is with gratitude for your service to Montana that I submit the following comments on behalf of the Tongue River Water Users' Association. Thank you for the opportunity to comment.

HB 575 is an anti-agriculture bill, and anti-water rights bill. This bill is an end-run around the long-established "first in time, first in right" prior appropriation doctrine, which has been the backbone of Montana water law and water law throughout the arid western United States and Montana since the mid to late 1800s. HB 575 leaves Montana's agricultural producers who rely on their senior water rights without recourse to protect their senior groundwater rights. The Montana Constitution, at Article IX, Section 3(1), confirms existing water rights, making them inviolable. Article IX, Section 3(2) also embodies the prior appropriation doctrine. Below is Article IX, Section 3 of the Montana Constitution:

ARTICLE IX. ENVIRONMENT AND NATURAL RESOURCES

Section 3. Water rights.

(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Convention Notes: (1) New provision guaranteeing all existing rights to the use of water. (2) No change except in grammar. (3) New provision recognizing state ownership of all water subject to use and appropriation by its people. (4) New provision requiring legislature to pass laws establishing a central records system so that records of water rights may be found in a single location as well as locally.

Compiler's Comments:

Former Constitutional Provision: Subsection (2) of this section is similar to Art. III, sec. 15, 1889 Mont. Const.

(Excerpted from Montana Code Annotated (2007)).

The Montana Supreme Court has time and again confirmed that water rights are valuable property rights:

The following concepts require no citation of authority: One who has appropriated water in Montana acquires a distinct property right; this water right is a species of property in and of itself and may exist separate and independent of a ditch right; each is capable of several and distinct injuries; *both water rights and ditch rights are considered property of the highest order.*

Harrer v. Northern Pacific Railroad, 147 Mont. 130, 134 (1966). Additionally, it is widely recognized throughout Montana and the West that senior water rights add significant economic value to the real property where those rights attach and are appurtenant. *See, e.g., Hale v. County of Jefferson*, (1937), 39 Mont. 137, 101 P. 973, 975 (stating that “[a] ditch and water right, attached to agricultural lands, add a large

element of value to them, by contributing to their productiveness, which, in turn, determines their actual value.”)

In Montana, water rights are property rights, which may not be taken without due process of law. Article II, Section 17 of the Montana Constitution provides that “[n]o person shall be deprived of life, liberty, **or property without due process of law.**” The Montana Supreme Court noted that “due process generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action.” *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 13, 300 Mont. 16, ¶ 13, 3 P.3d 603, ¶ 13 (quoting *Dorwart v. Caraway*, 1998 MT 191, ¶ 76, 290 Mont. 196, ¶ 76, 966 P.2d 1121, ¶ 76). Concerning water rights, the Montana Supreme Court held that Article IX, Section 3(1) “prevents the State from affecting rights vested at the time the Constitution was adopted . . . **without affording due process of law . . .**” *Adjudication of Rights of Yellowstone River* (1992), 253 Mont. 167, 174 832 P.2d 1210 (quoting *Department of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948.)

This bill takes “groundwater” and renames it “production water.” In so doing, it deprives people with senior groundwater rights of the opportunity for notice and hearing on their ground water rights, and results in a due process violation—the taking of a significant and very valuable property right without any ability to protect and defend that property right.

Page 2 of HB 575, at lines 22-23, amends § 82-11-101, MCA, adding a section which provides that “(14) “Production water” means fresh, brackish, or saline water associated with the production of oil or gas, the volume of which is dependent entirely on oil or gas withdrawals that are regulated by the board [of Oil and Gas Conservation].”

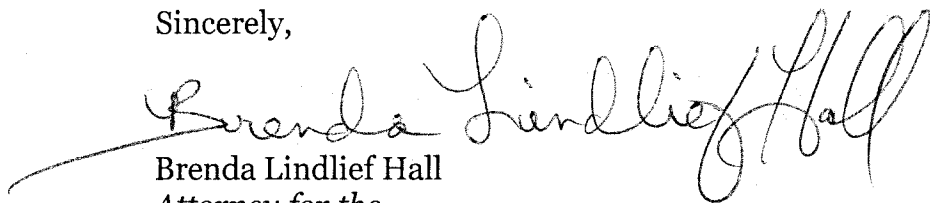
Judge Jones, district court judge in Big Horn County, recently ruled that the DNRC could not abrogate its constitutional duty to oversee water rights or allow waste of Montana's precious water resources, stating: "The significant state interest in the management of enormous quantities of groundwater is advanced by appropriate state agency review [DNRC]." *Diamond Cross v. DNRC*, DV-05-20 (Montana Twenty-Second Judicial District Court, July 14, 2008.)

In an even more recent ruling, Judge Honzel, who recently retired as district court judge for the Montana First Judicial District Court, concluded that where coalbed methane production is concerned, "the source of the water is still the ground and the point of diversion is the ground." Judge Honzel also noted that "the water only gets to the pipeline because it is pumped from the ground which is the source of the water and point of diversion." And finally, Judge Honzel noted that "Petitioners' constitutional claims arise because the hearing examiner held that the water is something other than Ground water, thereby precluding them from presenting evidence on whether Fidelity's application would adversely affect their water rights." This, of course, is a due process violation—a fundamental right of highest order under Article II, Section 17 of the Montana Constitution.

HB 575, if passed, will be unconstitutional for a number of reasons, including due process violations, and a violation of the public trust reposed in the state by Article IX, Section 3 of the Montana Constitution, and a violation of the constitutional provision confirming existing water rights.

On behalf of the Tongue River Water Users' Association, I urge a DO NO PASS on HB 575.

Sincerely,

A handwritten signature in cursive script that reads "Brenda Lindlief Hall". The signature is written in dark ink and is positioned above the printed name.

Brenda Lindlief Hall
*Attorney for the
Tongue River Water Users' Association*